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OCTOBER TERM, 1980

SUPREME COURT OF THE UNITED STATES

MARK J. MILLS, MICHAEL GILL AND
WILLIAM MALAMUD,

Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY BYBEL,
JAMES COLLERAN, DONNA HUNT,
WILLIE WADSWORTH, AND HAROLD WARNER,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO PLAINTIFFS-RESPONDENTS MOTION TO DISMISS WRIT OR IN THE ALTERNATIVE CERTIFY CERTAIN QUESTIONS TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether this Court should dismiss the writ of certiorari or in the alternative certify the question of the right of institutionalized mental patients to refuse antipsychotic medication to the Massachusetts Supreme Judicial Court in light of a recent decision by that Court resolving issues not involved in this case?

2. Whether it would be more appropriate to defer consideration of the arguments made in plaintiffs' motion until after oral argument in this case?

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STATEMENT OF THE CASE

The defendants-petitioners adopt the Statement of the Case in their Brief. Petitioners' Brief at pp. 5-12.

In addition, defendants note that their Petition for Certiorari was filed on or about February 20, 1981. On or about March 24, 1981, plaintiffs-respondents filed an Opposition to the Petition for Certiorari. In their Opposition, at pp. 20-22, plaintiffs argued that this Court should deny the certiorari petition because the then pending Massachusetts Supreme Judicial Court case In the Matter of Guardianship of Richard Roe, III, might resolve on independent state grounds the issues raised in this case. On or about March 30, 1981, defendants filed a Reply Brief to the Opposition to Petition for Certiorari. In this Reply Brief, defendants noted that the issues in the

Roe case were distinct from the issues in the case at hand and a decision in the Roe case could not be based on state grounds definitive of the issues in this case. This Court, apparently recognizing the difference in the issues raised in the Roe case and this case, granted the petition for a writ of certiorari on April 20, 1981.

Only three days later, on April 23, 1981, the Massachusetts Supreme Judicial Court issued its opinion in the case of In the Matter of Guardianship of Richard Roe, III, Mass. Adv. Sh. 981, 421 N.E. 2d 40 (1981). Five months after the issuance of this opinion, plaintiffs now ask this Court to dismiss the writ of certiorari or to certify certain questions in light of the decision in the Roe case. Plaintiffs' motion to dismiss relies on the same reasons they offered for opposing the Petition for a Writ of Certiorari in the first place.

SUMMARY OF ARGUMENT

IA

The Supreme Judicial Court explicitly stated and carefully drafted its opiniion in the case entitled In the Matter of Guardian of Richard Roe, III, to make clear that its decision was not outcome determinative in the Mills case. The court in Roe explicitly stated on four separate occasions that its decision in that case was not dispositive of the issues in this case involving institutionalized patients.

IB

The Supreme Judicial Court made reference to no state statutes or regulations in rendering its opinion in Roe. The only "common law" right on which the court relied in reaching its opinion was the common law right of persons of

sound mind to determine what shall be done with their own bodies. Plaintiffs' arguments that the Supreme Judicial Court decided certain dispositive issues in the case as a matter of state law either (1) misstate the Roe opinion, (2) rely on language in Roe which is not dispositive of the issues in this case, and/or (3) seek to transform mere findings of fact in Roe into rulings of state law.

IC

Although plaintiffs, as intervenors in the Roe case, specifically sought to get the Supreme Judicial Court to rely on state statutes and regulations in reaching its opinion, the court declined to do so.

ID

The Roe opinion resolved none of the federalism issues for which this Court issued a Writ of Certiorari, as the

District Court would still be free to design expansive procedures in violation of the tenets of federalism if this Court were to dismiss the Writ of Certiorari.

II

Plaintiffs' proposal to certify questions to the Supreme Judicial Court is a blatant attempt at forum shopping. Plaintiffs do not cite to a single ambiguous Massachusetts statute or regulation that they seek to have the Massachusetts court clarify. Rather, plaintiffs seek to send the constitutional issues in this case to the Massachusetts court in the guise of their being some existent Massachusetts common law somehow distinguishable from constitutional law.

III

Given (1) the inter-related nature of plaintiffs arguments made in their Motion

to Dismiss and in their Brief on the Merits, and (2) the fact that all briefs except defendants' Reply Brief have already been submitted to the Court, it would be more appropriate to defer consideration of the arguments made in plaintiffs' Motion to Dismiss until after oral argument in this case.

ARGUMENT

I. THE WRIT SHOULD NOT BE DISMISSED AS IMPROVIDENTLY GRANTED, AS THE MASSACHUSETTS SUPREME JUDICIAL COURT OPINION IN THE ROE CASE DID NOT RESOLVE OR DEAL WITH ANY ISSUES OF STATE LAW DISPOSITIVE OF THE ISSUES BEFORE THE COURT IN THE CASE AT HAND.

A. The Massachusetts Supreme Judicial Court Explicitly Stated That Its Decision in Roe Was Not Dispositive of the Issues in This Case.

The Roe case arose in a significantly different context than the Mills case. Roe was a patient at Northampton State Hospital, temporarily committed for observation, when he first refused his

antipsychotic medication. 421 N.E. 2d at 44. The medical director of the hospital, acting in accordance with the temporary restraining order in Mills sought to have a guardian appointed for Roe. Thus, unlike in Mills, there was no dispute as to whether a guardian must first be sought before a patient can be forcibly medicated; rather, that fundamental constitutional issue is being litigated in Mills and was simply being followed in Roe.

After appointment of his guardian, Roe was found to be not commitable and was released to live with his family. 421 N.E. 2d at 62. His father, who was his guardian, did not propose at that time to authorize the forcible administration of medication to his son. Equally significant, the uncontradicted testimony at trial was that the forcible administration of antipsychotic medication

in the home setting is not recommended given the inability to monitor the patient's tolerance or development of side effects. Roe Trans. 6/19/80, pp. 122-125.

The Department of Mental Health intervened in the Roe case. The major section of its brief to the Massachusetts Supreme Judicial Court argued that as there was no case and controversy regarding (1) whether an institutionalized mental patient has a right to refuse antipsychotic medication in a non-emergency absent appointment of a guardian and (2) whether a guardian to an institutionalized mental patient may consent to the forcible administration of medication absent a substitute judgment hearing, the Massachusetts Supreme Judicial Court should decline to decide these issues.

In apparent agreement with the

Department of Mental Health's argument, the very first sentence in the Roe case states that "[t]he ultimate question we address in this case is whether the guardian of a mentally ill person possesses the inherent authority to consent to the forcible administration of antipsychotic medication to his institutionalized ward in the absence of an emergency." 421 N.E. 2d 42. (Emphasis added).

The Massachusetts court in Roe then goes on to state explicitly on four separate occasions that its decision in that case would not be dispositive of the issues in this case involving institutionalized patients. The court declares:

> As we discuss at length in Part III, infra, the guidelines we establish herein are applicable in circumstances in which all of the following factors exist: (1)

an incompetent individual is not institutionalized:

* * *

421 N.E. 2d at 42

> It has been held that patients involuntarily committed to State mental hospitals are entitled to a judicial determination of incapacity before they may be forcibly medicated with mind-altering drugs[14]/ Rogers II, supra at 661.
>
> 14./ We express no opinion concerning whether such a finding is sufficient judicial involvement to permit other persons to make subsequent medical treatment decisions for involuntarily committed patients.

421 N.E. 2d at 55, 55 (n. 14).

* * *

> We do not address the question of whether and to what extent the State interest in institutional order and safety may be capable of overwhelming the right of an involuntarily committed individual to refuse medical treatment. Cf. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962); Commissioner of Correction v. Myers, ___ Mass. ___, 399 N.E.2d 452 (1979) (Mass. Adv. Sh. [1979]

2523); Rogers II, supra; Rogers I, supra.

421 N.E. 2d at 61, n. 23

* * *

> Specifically, we decline to rule on the right of patients confined against their will to State hospitals to refuse antipsychotic medication.

421 N.E. 2d at 62.

It is difficult to imagine how the Massachusetts Supreme Judicial Court could have been any clearer that it was not deciding on any grounds, constitutional or state, the issues raised in the Mills case.

B. The Only Issues Decided on State Grounds in the Roe Case Are Not Dispositive of the Issues in this Case.

The Massachusetts Supreme Judicial Court notes in Roe that it grounded various parts of the results of its opinion on (1) the constitutional right to privacy, (2) the common law, and (3) the inherent powers of the court to control the

exercise of authority by guardians. 421 N.E. 2d at 42 (n. 1), 51 (n. 9). To the extent that parts of the Roe opinion are based on the court's interpretation of the Constitution, this Court is obviously not bound to follow Roe. These parts of the Roe opinion based on the court's power to control the exercise of authority of guardians also cannot be relevant to the Mills case, which presents the question of whether guardians must be appointed in the first place and not the question of what authority they have once appointed. Thus, it must be determined what parts of the Roe opinion are based on common law and whether these parts of the opinion can be dispositive of the issues in the Mills case.

In fact, the Massachusetts Supreme Judicial Court in its twenty-two page opinion refers to only one common law

"right" which in any way or manner influenced its opinion. The court noted that it relied in part on "the common law right of every person 'of adult years and sound mind . . . to determine what shall be done with his own body. Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92 (1914) (Cardozo, J.)."[1/] 421 N.E. 2d at 51, n. 9. The issue in Mills is not whether persons of "sound mind" have a right to refuse treatment. Rather, the issue is whether persons who are so unsound of mind to have been found mentally ill by a court have a right to refuse treatment after their commitment.

1/ It is interesting that the only common law case cited is not even a Massachusetts case. This makes it ever clearer that the Massachusetts court was not deciding that there is something peculiar about Massachusetts state law which obviates the need of this Court to decide the general issue of an institutionalized patient's right to refuse treatment.

Thus, the actual reliance by the Massachusetts Supreme Judicial Court placed on the common law does not obviate the need for this Court to decide the issues in the Mills case.

Plaintiffs argue in their Motion to Dismiss the Writ that "in interpreting Massachusetts law, the Supreme Judicial Court has held that commitment to a hospital in Massachusetts is not an adjudication of incompetency nor does a commitment mean that a patient is incompetent to make treatment decisions." Plaintiffs' Motion, at pp. 10-13. In fact, the Supreme Judicial Court did imply that commitment is not an adjudication of incompetency in Massachusetts when it declared there is a profound distinction between commitment and the determination of incompetency. 421 N.E.2d at 55. See, also, to a similar effect, M.G.L. c. 123,

§ 25. The court did not offer any opinion as to whether commitment infers that a patient is incompetent to make treatment decisions. Even if, arguendo, the Supreme Judicial Court said everything plaintiffs allege (i.e., commitment cannot be equated with incompetence to make treatment decisions), such a ruling would still be irrelevant to the issues in this Court. Defendants recognize that when a patient is committed, the patient retains certain legal rights and legally is still considered competent in certain areas. The question in Mills however, is whether the "legal" competence of the patient has any relevance to the state's right to medicate the patient forcibly. As the defendants argue in their Brief on the Merits, at pp. 26-35, it is the state's assumption of the decision making role regarding treatment at the commitment

hearing and not the patient's competency which is the factor relevant to whether the state can exercise its powers to medicate institutionalized patients forcibly. See, also, Amicus Brief of the American Psychiatric Association, at pp. 21-27 (Competency is simply an ill-suited standard for coping with patient refusals during an on-going treatment program involving the administration of medication).

Plaintiffs further argue in their Motion to Dismiss the Writ that "in interpreting Massachusetts law, the Supreme Judicial Court has held that commitment does not justify forced medication under the state's parens patriae power." Plaintiffs' Motion, at pp. 13-15. This argument is disingenuous, grossly taking out of context the ruling of the Supreme Judicial Court.

The Supreme Judicial Court specifically ruled that "it has been held" that patients involuntarily committed to State mental hospitals are entitled to a judicial determination of incompetency before they may be forcibly medicated, because the commitment decision is an inadequate predicate to the forcible administration of drugs where the purported justification for that action is the parens patriae power. 421 N.E. 2d at 55. The Supreme Judicial Court cited to the First Circuit opinion in the Mills case as the court which had held the above. The Supreme Judicial Court did not declare that as a matter of state law commitment is an insufficient predicate to force medication. Rather, it simply noted that in the Mills case presently before this Court, the lower court had held as a matter of constitutional law that

commitment did not justify forced medication. This Court has granted certiorari precisely to review this question. Moreover, the plaintiffs deliberately omitted the footnote to the section of the Roe opinion on which they rely, which specifically states that "[w]e express no opinion concerning whether such a finding [of mental illiness at commitment] is sufficient judicial involvement to permit other persons to make subsequent medical treatment decisions for involuntarily committed patients." Id at 55, n. 14.

Finally, plaintiffs argue that "in its interpretation of Massachusetts law, the Supreme Judicial Court in Roe settled the issue of at what point a patient's right to refuse may be overriden by the state's police power. Plaintiffs' Motion, at pp. 15-18. Plaintiffs appear to argue

that because the court found that when antipsychotic drugs are used to protect the public safety and to prevent violence the drugs "function as chemical restraints", as a matter of state law antipsychotic drugs can only be used when there is a serious threat of, or as a result of extreme violence, personal injury or attempted suicide. Id. Plaintiffs rely on M.G.L. c. 123 §21, D.M.H. Reg. 223.02 which provides that restraints can only be used in emergencies.

However, it is difficult if not impossible to comprehend plaintiffs' argument that the Supreme Judicial Court's finding of fact regarding chemical restraints is somehow an interpretation of Massachusetts law. A finding of fact is a finding of fact; an interpretation of law

is an interpretation of law.[2/]

Even accepting, arguendo, that the Supreme Judicial Court's findings have any binding effect on this Court, they do not resolve as a matter of state law any issues in this case. This is because the Massachusetts law, DMH Reg. §223.03, upon which plantiffs' rely specifically notes

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2/ Plaintiffs admit that the Supreme Judicial Court did no more than rule as a finding of fact that the use of drugs for certain purposes functions as a chemical restraint and did not indicate what, if any, significance this finding had to an interpretation of state law. Plaintiffs' Motion, at p. 17. This Court is not bound to accept the Supreme Judicial Court's findings of fact. In constitutional litigation, this Court is not bound by the findings of fact of even lower courts in the same case, Whitus v. State of Georgia, 385 U.S. 545, 550 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 285, n. 26 (1964); Haynes v. State of Washington, 373 U.S. 503, 515-516 (1963), let alone by the findings of a state court in an unrelated case.

Moreover, the fact finding process in Roe is particularly undeserving of

(footnote continued)

that restraints which can only be used in emergency situations "shall mean . . . (2) chemical and therapeutic restraints except when these are used as a part of a planned medical, psychotherapeutic program." (Emphasis Added). Appendix to Petition for Cert., at p. 1952.

(footnote continued)

deference. There was no record in the Roe case supporting the Court's factual findings regarding antipsychotic medication. The Court did not once cite to the record in its own case in support of its findings. Three doctors testified at the Roe trial and they all supported the use of antipsychotic medication. The lower court found that the use of antipsychotic medication is a recognized and acceptable treatment in medical practice for schizophrenia. Roe App. p. 26, No. 35. The lower court further found that the likelihood of side effects was only approximately fifty per cent, and dosage can be controlled to allow monitoring of the patient's tolerance to the medication. Roe App. p. 26, No. 36.

In reaching its opinion, the Court placed great reliance on legal, not psychiatric references for data on the use of antipshychotic medication. The Court

(footnote continued)

C. The Supreme Judicial Court in Roe Failed To Base Its Ruling On Independent State Grounds Despite Plaintiffs' Specific Request That They Do So.

Plaintiffs in this case intervened in the Roe case. In their brief to the Supreme Judicial Court, plaintiffs argued that as a matter of state law all mental patients had a right to refuse antipsychotic medication except in emergencies. Plaintiffs asked the court to rely on specific state statutes and regulations to which they directed the

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(footnote continued)

placed particular reliance on an article authored by a lawyer, Robert Plotkin, "Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment", 72 NW U.L.Rev. 461 (1977). Given the lack of a record in the Roe case supporting the Court's conclusions, the Court found itself required to rely on the writings of an unknown authority, whose credentials, bias and scholarly research abilities were unknown to the Court.

court's attention.[3/] The Supreme Judicial Court failed to cite to a single state statute or regulation as the basis of its opinion despite plaintiffs' attempt to get them to do so.

D. The Supreme Judicial Court's Opinion in Roe Has Resolved None of the Federalism Issues Involved in this Case.

Plaintiffs apparently argue that the District Court on remand in this case is now bound to adopt the procedures set forth in Roe. Thus, plaintiffs apparently conclude that whether or not the First Circuit overstepped its bounds in remanding the case to the District Court "to be creative in designing procedural mechanisms", the District Court now no longer has any discretion as to what it can do.

3/ See Defendants' Brief on the Merits, at pp. 31-33, Fn. 9, showing that Massachusetts law, in fact, quite clearly recognizes no right of an institutionalized patient to refuse antipsychotic medication.

This argument is fundamentally flawed. The Roe procedures deal only with the steps that should be taken once a guardian is appointed. They do not discuss the myriad number of other procedures that the plaintiffs have proposed and the District Court could be "creative" in implementing, such as (1) procedures for handling emergencies, (2) procedures for departmental review of the use of antipsychotic medication; and (3) procedures providing a role for patient advocates in addition to guardians. Moreover, plaintiffs assmue that the Roe procedures are relevant to involuntarily committed patients; this is the exact issue which this Court must decide.

II. THE QUESTIONS PROPOSED BY THE PLAINTIFFS SHOULD NOT BE CERTIFIED TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Plaintiffs propose certifying six questions to the Massachusetts Supreme

Judicial Court:

1. Do competent and imcompetent civilly committed patients have the right to refuse anti-psychotic drugs under the state law?

2. Is commitment to a mental hospital synonymous with incompetence to make anti-psychotic drug treatment decisions under Massachusetts law?

3. In Massachusetts, before civilly committed patients may be treated as incompetent to make treatment decisions, must they be specifically adjudicated incompetent to make treatment decisions by a court?

4. Under Massachusetts law is the commitment decision itself an adequate predicate to the administration of anti-psychotic drugs to an involuntarily committed individual where the purported justification for that action is the state's parens patriae power?

   a. When does the state's parens patriae power override an involuntarily committed patient's right to refuse anti-psychotic drugs?

5. Does Massachusetts law require prior court approval, based on the substituted judgment standard, before a doctor may treat an incompetent civilly committed mentally ill person with anti-psychotic drugs?

6. When anti-psychotic drugs are administered to involuntarily committed patients to protect the safety of other patients or to prevent or control violence, do the drugs, under Massachusetts law, function as chemical restraints?

   a. If the drugs in those circumstances function as chemical restraints, are state doctors required to follow the state law, M.G.L. c. 123 §1, 21, and Department of Mental Health Regulations which requires their use only "in cases of emergency, where there is a serious threat of or as a resultof extreme violence, personal injury or attempted suicide?

Essentially, plantiffs propose certifying all the ultimate questions in this case to the Supreme Judicial Court to decide. The questions plaintiffs seek to certify require an understanding of the nature of the mental illness of involuntary patients and a balancing of the State's interests in forcibly medicating involuntary patients with the patients' interests in refusing the medication. In order to answer the

questions plaintiffs seek to certify, the Masachusetts Supreme Judicial Court would have to have the entire factual record of this case before them. Plaintiffs do not cite to a single ambiguous Massachusetts statute or regulation that they seek to have the Massachusetts court clarify. Rather, they ask this Court to certify the issues in this case to be decided on "common law" grounds rather than "constitutional" grounds. Given the intimate relationship between the common law and many of the basic freedoms recognized in our Constitution, this argument for certification could be used in probably a majority of the constitutional cases before this Court. To accept this argument would be to seriously impede the orderly appellate process of the Federal judicial system. Plaintiffs are seeking to send the

constitutional issues in this case to the Massachusetts court in the guise of there being some existent Massachusetts common law somehow distinguishable from constitutional law.

Plaintiffs' request to certify questions to the Supreme Judicial Court is clearly no more than a blatant attempt at forum shopping. Obviously pleased with the language in the Roe decision, plaintiffs seek to have the Supreme Judicial Court decide this case as well as the Roe case. There is no legal reason to grant plaintiffs' request.[4/]

4/ If plaintiffs really believed there were questions of state law controlling in this case, they could have sought to certify those questions years ago when the case was before the District Court. However, as the District Court offered a favorable forum to the plaintiffs as indicated by its issuance of the temporary restraining order, plaintiffs obviously did not decide until recently they would rather by in state court.

III. IT WOULD BE MORE APPROPRIATE TO DEFER CONSIDERATION OF THE ARGUMENTS MADE IN PLAINTIFFS' MOTION UNTIL AFTER ORAL ARGUMENT IN THIS CASE.

Plaintiffs' arguments to dismiss the writ as improvidently granted are intimately intertwined with the merits of the case. Plaintiffs cite to Roe on forty-two pages of their Brief on the Merits. Plaintiffs' argue in their Brief on the Merits that the sole factor relevant to whether the state can forcibly medicate a patient is whether that patient has been declared legally incompetent. Underlying Plaintiffs' motion to dismiss is this same argument.

Moreover, although the Roe decision was issued over five months ago, plaintiffs, for whatever tactical reasons, have waited until now to file their Motion to Dismiss. However, at this time the Court has already received both sides'

Briefs on the Merits and all Amicus Briefs. As no further Briefs need be written except defendants' Reply Brief, there is little reason not to hold oral argument first before deciding the complex issues in this case.

CONCLUSION

For the reasons stated in this Opposition, plaintiffs' Motion to Dismiss Writ or in the Alternative to Certify Certain Questions to the Supreme Judicial Court should be denied.

By Petitioners' Attorney,

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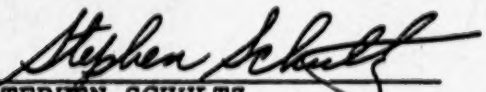
ATTORNEY GENERAL



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